"A. We are towed back in the morning. I went up forward and I seen a light in front of me.

Q. A light in front of you? A. A lighter, a red one, 51 or 55 something like that.

Q. Was that the number on the lighter? A. Yes, it was over 500, a red one.

Q. 51? A. 551 or 552, something like that.

Q. What color was the lighter? A. Red.

Q. How big was it? A. I would say it's at least 14,000 tons. It might carry 10,000 or 30,000, something like that. One of the big ones. He was picked up at night.

Q. It was picked up at night? A. Yes.

Q. At what time? A. I don't know, because I was sleeping." (p. 14-15).

* * *

"Q. Did you throw a hawser? A. No. I was in bed. When he put that on, I was sleeping. In the morning I woke up, I seen it. I went up forward. I say 'How the hecks did he get there?'

Q. Did you talk to him? A. No, he don't talk to you. You are only a bum when you are a scow captain. I say, 'How the hecks did he get in.' When I stood up to watch, to go aft, the harbor goes in a circle and it swings out, and when it swung around they hit my corner.

Q. Who hit your corner? A. I don't know. The scow was a little bit slippery on deck and I fell overboard.

Q. Who hit your corner, was that the scow that hit your corner or the lighter? A. The lighter.

Q. Hit your corner? A. Yes.

Q. Was the lighter tied up to the tug also? A. Yes.

Q. Where were you on the scow when you fell overboard? A. I was up forward.

Q. Were you on the port or starboard side of the scow? A. On the port side.

Q. Where was the lighter attached, the forward portion of the scow? A. Forward." (p. 16-17)

* * *

"Q. How many barges or scows did he take out with him? A. He only took one dumper out.

Q. One dumper? A. That's all." (p. 36)

Q. As soon as you finished dumping, did you go to bed? A. No, sir.

Q. What did you do next after you finished dumping? A. I tried to go to my bed. Here, for instance, that's the end of the scow. I dump it and—

Q. You are on the wrong drawing. Go down to number two. A. I put the dumper out, then I go aft, midships where I live, and when I go there the tow boat, the barge hit my corner and you only got so much to walk on. Then he hit the corner and over the side I went.

Q. Did that happen right after you dumped your cargo? A. No—yes, right after.

Q. Right after? A. No, not right after. Maybe an hour or two hours." (p. 41).

Q. When you came up in the morning, where were you, where was the scow and the tow? A. It was outside New Jersey there.

Q. Whereabouts? You can tell me where in Jersey. A. He passed the—

Q. Swinburne Island, Hoffman Island, Sandy Hook? A. That was under the Coast when that happened, on the Jersey Coast, and when I came up in the morning, so I look up. I see a boat in front of me. So I went up. When I went up there,

and the curve goes around, when he curved, this scow, here, the lighter I would say, not the lighter —that lighter, that corner hit me here." (p. 43)

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Facts on Damages

The discharge diagnosis for Adolph Berke's confinement to the United States Public Health Service Hospital immediately after the accident was that he was fit for immediate duty (86a).

Adolph Berke had a history of tuberculosis before his immersion on March 7, 1965 (80a). It is true that the hospital record for that initial March-April 1965 confinement shows that sputum samples taken during his stay then were developed after his discharge and proved positive (86a), requiring his recall to the hospital on June 1, 1965 for observation (88a). However, on Mr. Berke's return to the hospital twelve different sputum cultures were taken from him and they all proved negative (88a). Upon that basis and his examinations of the plaintiff, the plaintiff's medical expert witness told the Court that in his professional opinion any tubercular condition which Mr. Berke had probably cured itself at some time after the original sputum tests had been taken during the earlier admission to the hospital (90a-91a).

As a result of the two physical examinations which the plaintiff's medical expert conducted on Adolph Berke on April 19, 1966 and April 17, 1969 for the purpose of testifying in conjunction with a review of the hospital record (Plaintiff's Exhibits 1 and 1A) (74a, 75a) the only objective finding he made was that the plaintiff exhibited marked shortness of breath while putting on his shirt (73a). The doctor stated on the witness stand that all con-

ditions diagnosed either pre-existed the accident of March 7, 1965 or were cured in the hospital confinement of March to April 1965 with the one single exception of a bronchial condition which he said was worse after the accident (82a). With reference to that one condition the doctor testified that Mr. Berke had attained maximum recovery when he left the hospital on April 2, 1965 and that any subsequent treatment needed for the bronchial condition was limited to therapy and containment (71a-73a).

POINT I

There is no justification for a review of the decision of the Court of Appeals in this case on the issues of negligence and unseaworthiness.

There was never any proof in this case that the S-3 was inadequately manned. The testimony of plaintiff's witness affirmatively shows that on the day of the accident Adolph Berke was an experienced seaman in excellent physical and mental condition sufficient to perform his duties. As the sole officer and member of the crew of this dump scow, Mr. Berke was in complete charge and control of it and had the exclusive duty to keep it maintained in a seaworthy condition. Uncontested on this petition is the evidence presented by plaintiff's witness showing that this plaintiff's responsibilities included sweeping the debris off the decks and replacing the rope handlines around the scow after the drop-dumping type loading operation had been completed.

On trial the plaintiff's witness could not tell the Court whether or not the scow was equipped with the standard equipment of a replacable handrail or a squeegee or broom. Incidentally, the deposition taken before trial of Adolph Berke (Plaintiff's Exhibit 2 for identification) which the

petitioner's brief contends should have been admitted into evidence on the claim that at the time it was taken the plaintiff was perfectly lucid, provides absolutely no testimony from which a finding could be made that there was any absence of squeegee, broom or handrail on this vessel. This case was not the situation, as it was in *Schulz v. Pennsylvania Ry. Co.*, 350 US 523, of the plaintiff dying or becoming mentally incompetent as an immediate cause of the accident where there was no way to ascertain exactly what happened. Here the plaintiff's attorney had an opportunity, and did actually exercise it, to depose his client before trial and develop all of the facts upon which the case relied. The Trial Court examined this deposition before it made its ruling to determine whether there was any probative evidence in it and the Court of Appeals did the same before it made its determination.

Accordingly, the determination of the Court of Appeals that the plaintiff failed to produce any evidence that the S-3 was not equipped with hand lines and cleaning equipment which Berke could have used if he were so inclined should be held to be proper.

The plaintiff has the burden of producing evidence to establish at least *prima facie* that a condition was in existence which could be found to be unseaworthy (*Manhat v. United States*, 220 F 2d 143, 146, cert denied 349 U.S. 966). The petitioner's brief complains that he should not have been expected to establish the framework of facts referable to proving the absence of equipment required as a foundation for a finding of whether or not such a condition which would have existed had the equipment been proved missing was unseaworthy. Such legal reasoning would permit a verdict not only on speculation based upon facts proven but upon pure arbitrary decision without any conceivable relationship to evidence or its absence. In the absence of proof of a condition upon which

a finding of unseaworthiness can be predicated, the barge owner would be subject to absolute liability without any other showing than that an accident occurred aboard this vessel.

It is submitted that the law is definitive that the single member captain-crew of a vessel does not have a cause of action against his employer for injuries he incurred as a sole and direct result of his own failure and neglect to perform the very specific duty for which he was employed and for the purpose for which he was on board (*Great Northern* v. *Wiles*, 240 U.S. 444; *Schlichter* v. *Port Arthur Towing Company*, 288 F. 2d 801, cert. denied 368 U.S. 838; *Walker* v. *Lykes Bros. SS Co.*, 193 F 2d 772, 774, 775). The only evidence before the Court brings Adolph Berke clearly within the purview of this standard.

It is interesting to note that Plaintiff's Exhibit 2 for identification which the plaintiff's attorney so eagerly sought to substitute on trial for Adolph Berke's live testimony not only did not make the slightest reference to absence of equipment aboard the S-3 but the plaintiff there testified to the fact that his falling overboard was proximately occasioned by an altogether different event from that which his attorney was attempting to prove on trial. In that deposition, taken at a time his attorney insists the plaintiff was lucid, Mr. Berke told that he was caused to be thrown overboard as a result of a collision between his scow and another scow in the tow of the tug. Aside from the indication that a new and different theory of liability and a new set of facts were presented on trial as compared to what the only eye-witness to the event, the plaintiff himself, had related in his deposition to his attorney as well as to the other parties to the action and to the Court, it must be accepted that, if this deposition of Adolph Berke were to have been improperly excluded, it would not have added a single element of evidence to support the struc-

ture of the plaintiff's burden of proof and would have cast grave suspicion as to whether the case attempted to be made on trial was totally different from the facts as Adolph Berke, the only witness to his own accident, experienced them.

It is respectfully submitted that the findings and holdings of the Second Circuit Court of Appeals in affirming the determination of the Trial Court were correct and proper in all respects and firmly supported by the evidence. Therefore, its decision should not be subjected to further review.

POINT II

There is no justification for a review of the decision of the Court of Appeals on the issues of maintenance and cure.

The petitioner here seeks to have this Court upset the determination of the Court of Appeals based solely upon the fact that the hospital records of Adolph Berke show that while he was hospitalized between March 7, 1965, the date of his accident, and April 2, 1965, the date of discharge, a sputum culture was taken which was not developed until after he was discharged from the hospital. Then the earlier taken specimen was found to be positive for tuberculosis bacilli. Those facts, taken out of context from the record, are offered by the petitioner as the sole reason for his contention that the Trial Court should not have directed a verdict against Adolph Berke on the issue of maintenance and cure.

The petitioner ignores his own evidence which absolutely precludes such a contention:

1. The hospital record shows that on April 2, 1965, Adolph Berke was declared fit for immediate duty on that date (82a).

2. The plaintiff's own medical expert who reviewed the hospital records and examined the plaintiff (61a) testified that the plaintiff most likely had tuberculosis before his March 7, 1965 accident (80a), that the tuberculosis condition probably cured itself sometime after the sputum specimen had been taken and before the positive reaction was developed (90a-91a), that because of the result of the test the plaintiff was returned and committed to the Public Service Hospital, only for observation, on June 1, (87a) when twelve separate sputum cultures were taken and every single one of them proved negative (88a).

3. The same plaintiff's medical expert unequivocally stated to the Court that the plaintiff had reached maximum recovery when he left the hospital on April 2, 1965 and that any subsequent treatment or medication was for therapy and containment (71a-73a).

It is respectfully submitted that upon this evidence the Trial Court had no other alternative than to direct a verdict against Adolph Berke.

This selective focusing upon isolated, incomplete excerpts from the record by the petitioner in support of his contention on the issue of the propriety of the Court's decision as to maintenance and cure is indicative of the type of argument utilized in all aspects of this application for a Writ of Certiorari. Short of blind faith acceptance of the accuracy and completeness of the petitioner's presentation of the contents of the record on appeal, it can

be clearly seen that there are no merits for this application for a review of the determination of the United States Court of Appeals for the Second Circuit in this action. That determination was sound in law and firmly founded upon the plaintiff's own clear and unequivocal evidence.

CONCLUSION

The request for a Writ of Certiorari should be denied.

Respectfully submitted,

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